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No. 90-888

In the Supreme Court of the United States

OCTOBER TERM, 1990

ARTHUR L. MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THOMAS W. OSBORNE
Cmdr., JAGC, USN

J. RICHARD CHEMA
Lt. Cmdr., JAGC, USN
Appellate Government Counsel
Appellate Government Division, NAMARA
Washington, D.C. 20374-1111

QUESTION PRESENTED

Whether the trial court properly admitted under Mil. R. Evid. 801(d)(1)(B) a prior consistent statement made by the victim after petitioner alleged that the victim's trial testimony was a recent fabrication.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-10a) is reported at 31 M.J. 43. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 11a-16a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 7, 1990. The petition for a writ of certiorari was filed on December 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial of forcible sodomy

upon a child and wrongfully communicating indecent language to that child, in violation of Articles 125 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925 and 934. The court-martial sentenced petitioner to 10 years' confinement, a dishonorable discharge, total forfeiture of pay, and a reduction in rank. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. The Court of Military Appeals granted discretionary review and affirmed.

1. On October 1, 1987, petitioner invited the victim's mother and the victim, a four-year-old girl, to his home for dinner. Tr. 89. During the evening, while petitioner was alone with the victim, he anally sodomized her. Tr. 189, 191-195. Later that evening, the victim reported the incident to her mother. Tr. 104, 194-195. The mother examined the child's anus and saw an irritation and blood. Tr. 105-106. The mother took her daughter to a hospital, where the attending physician confirmed that the victim's anal area had been significantly damaged. Tr. 108, 214-216; GXs 2, 6, and 7. A videotaped interview between the child and a social worker was conducted in which the child, with the aid of anatomical dolls, described petitioner's conduct. Tr. 286-300. The child subsequently testified about the events at an Article 32 hearing. Tr. 282.[1]

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[1] Article 32, UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted before trial in civilian criminal justice systems. The defendant has the right to be informed of the charges against him, to be present at the hearing, to be represented by counsel (and to have counsel appointed for him), to be informed of the identity of the witnesses that the prosecution expects to call, as well as the identity of his accuser, to cross-examine all available witnesses, and to present evidence in his own defense or

2. Petitioner's strategy at trial was to contend that the child's allegations were false, the result of improper influence exerted on the child by her mother, who persuaded or forced her daughter to manufacture the allegations in order to help ensure that the mother's husband, who was deployed overseas, would be returned home early. Tr. 83-84. Petitioner also asserted that the child's testimony had been "coached" by being "repeated over and over," and that her trial testimony was inconsistent with her earlier testimony at the Article 32 hearing. Tr. 122, 196-199, 471-473.

Defense counsel announced his strategy during his opening statement. Tr. 83-84. He used cross-examination of the victim and the mother to advance his theory, and he stressed that theory in his closing argument as the basis for acquitting petitioner. Tr. 122, 132-134, 137, 471-473. To rebut petitioner's contentions, the prosecutor offered the videotaped interview of the victim as a prior consistent statement under Mil. R. Evid. 801(d)(1)(B).[2] Tr. 277. Petitioner objected to the videotape at trial, although his objection was vague and unfocused. Tr. 281-282. He now objects to the use of the videotape on the ground that it would not rebut the alleged motive to fabricate because the motive to fabricate on the part of the mother existed prior to the initial complaint and the videotaped interview.

The trial court overruled the objection, holding that Mil. R. Evid. 801(d)(1)(B) had no "timing parameters" and that the nature of the cross-examinations of the victim and mother made the videotape admissible as a prior con-

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in mitigation of the severity of the charges. Art. 38, UCMJ, 10 U.S.C. 838; Rule for Court-Martial 405(f) and (g), *Manual for Courts-Martial, United States* – 1994 (*Manual*).

[2] Rule 801(d)(1)(B) of the Military Rules of Evidence was taken without change from the Federal Rules. Analysis, Military Rule of Evidence 801(d)(1), *Manual*.

sistent statement. Tr. 284-285. The videotaped interview was played for the court-martial members. Tr. 286.

3. The court of military review affirmed. Pet. App. 11a-16a. It held that the videotape was admissible under Mil. R. Evid. 801(d)(1)(B) because all of the requirements of the Rule were satisfied. Pet. App. 13a-16a.

4. The Court of Military Appeals affirmed. Pet. App. 1a-10a. In an earlier decision, *United States* v. *McCaskey*, 30 M.J. 188 (C.M.A. 1990), the court had held that a statement is admissible under Mil. R. Evid. 801(d)(1)(B) only if the statement was made prior to the time when the alleged recent fabrication or improper influence occurred. Relying on *McCaskey*, the Court of Military Appeals in this case held that the victim's statement was properly admitted because she uttered the statement before the Article 32 hearing, and the defense claimed that the witness had fabricated her testimony after that hearing. Pet. App. 7a.

ARGUMENT

Petitioner maintains that a statement must be made prior to the time when the alleged recent fabrication or improper influence occurred in order for that statement to be admissible under Mil. R. Evid. 801(d)(1)(B). Petitioner also contends that there is a conflict among the circuits on that question. Pet. 5.

Petitioner is correct that there is disagreement among the circuits on the "timing" issue,[3] but this case is not an ap-

[3] The Fifth, Sixth, Tenth, and Eleventh Circuits have held that a statement can be admitted under Fed. R. Evid. 801(d)(1)(B) even if the statement is made after the alleged recent fabrication or improper influence occurred. *United States* v. *Parry*, 649 F.2d 292, 296 (5th Cir. 1981); *United States* v. *Hamilton*, 689 F.2d 1262, 1273-1274 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); *United States* v. *Rios*, 611 F.2d 1335, 1349 (10th Cir. 1979); *United States* v. *Anderson*, 782 F.2d 908, 915-916 (11th Cir. 1986). The First, Second, Fourth, Seventh, and Ninth

propriate vehicle for resolving that disagreement. The Court of Military Appeals adopted the rule that petitioner has urged in this Court. In both this case and *McCaskey*, the Court of Military Appeals held that a statement is admissible under Mil. R. Evid. 801(d)(1)(B) only if the statement was made before the time when the alleged recent fabrication or improper influence occurred. Accordingly, petitioner's disagreement with the Court of Military Appeals amounts to nothing more than the argument that that court misapplied the correct standard to the facts of this case. That fact-bound claim does not warrant review by this Court.

In any event, the Court of Military Appeals correctly found that the victim made the videotaped statement well in advance of the time that, under the defense theory, the victim's mother began to "coach" her daughter about what testimony to give at trial. The victim made the videotaped statement shortly after being examined at the hospital on the evening of the assault, which occurred long before either the Article 32 hearing or the trial. Under these circumstances, the court below correctly held that the victim made the statement before the alleged "coaching" incidents

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Circuit decisions cited by petitioner have adopted the contrary rule, albeit in dicta. *United States* v. *Vest*, 842 F.2d 1319, 1329-1330 (1st Cir.), cert. denied, 488 U.S. 965 (1988); *United States* v. *Brennan*, 798 F.2d 581, 587 (2d Cir. 1986), cert. denied, 109 S. Ct. 1750 (1989); *United States* v. *Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984); *United States* v. *Monzon*, 869 F.2d 338, 343 (7th Cir.), cert. denied, 109 S. Ct. 2087 (1989); *United States* v. *Smith*, 893 F.2d 1573, 1581 (9th Cir. 1990). Eighth Circuit decisions on this question point in both directions. Compare *United States* v. *Scholle*, 553 F.2d 1109, 1122 (8th Cir.), cert. denied, 434 U.S. 940 (1977) (statement need not be made before alleged recent fabrication or improper influence occurred), with *United States* v. *Bowman*, 798 F.2d 333, 338 (8th Cir. 1986), cert. denied, 479 U.S. 1043 (1987) (statement must be made before alleged recent fabrication or improper influence occurred).

were claimed to have occurred. Because the decision below is correct and because the court applied the legal theory that petitioner urges this Court to adopt, the judgment below does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

THOMAS W. OSBORNE
Cmdr., JAGC, USN

J. RICHARD CHEMA
Lt. Cmdr., JAGC, USN
Appellate Government Counsel
Appellate Government Division, NAMARA

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